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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SOUTHERN PACIFIC COMMUNICATIONS COMPANY, *et al.*,
Petitioners,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Dated: January 3, 1985

QUESTIONS PRESENTED

1. In an antitrust suit against American Telephone & Telegraph Company ("AT&T"), should the trial court's judgment be reversed for bias where its opposition to the policies of the FCC favoring long distance telephone competition led it to copy all of AT&T's proposed findings of fact and decide every legal and factual issue adversely to the plaintiff?

2. Even if the foregoing facts do not establish disqualifying bias, did the Court of Appeals err in applying a "clearly erroneous" standard of review to the trial court's judgment?

PARTIES TO THE PROCEEDING

The petitioners (appellants below) are Southern Pacific Communications Company and Transportation Microwave Corporation, former direct or indirect subsidiaries of Southern Pacific Company. In June of 1983, Southern Pacific Communications Company was acquired by GTE Corporation; the acquired entity is now known as GTE Sprint Communications Corporation. Southern Pacific Company retained the cause of action which is the subject of this petition.

The appellee below was American Telephone & Telegraph Company, which formerly included the following domestic Bell operating companies:

Bell Telephone Company of Nevada

Bell Telephone Company of Pennsylvania

Chesapeake & Potomac Telephone Company

Chesapeake & Potomac Telephone Company of Maryland

Chesapeake & Potomac Telephone Company of Virginia

Chesapeake & Potomac Telephone Company of West Virginia

Cincinnati Bell, Inc.

Diamond State Telephone Company

Illinois Bell Telephone Company

Indiana Bell Telephone Company

Michigan Bell Telephone Company

Mountain States Telephone & Telegraph Company

New England Telephone & Telegraph Company

New Jersey Bell Telephone Company

New York Telephone Company

Northwestern Bell Telephone Company

Ohio Bell Telephone Company

Pacific Northwest Bell Telephone Company

Pacific Telephone & Telegraph Company

South Central Bell Telephone Company

Southern Bell Telephone & Telegraph Company

Southern New England Telegraph Company

Southwestern Bell Telephone Company

Wisconsin Telephone Company

The subsidiaries and affiliates of Southern Pacific Company are:

1. *Solely Controlled Affiliated Companies* (separately operated):

The capital stock of companies listed below is owned by Southern Pacific Company directly, or indirectly in case of subsidiaries:

Bankers Leasing and Financial Corporation

Bankers Leasing Corporation

Associados Internationales del Pacifico

BLC Corporation

Commetro Leasing, Inc.

Commonwealth Control, Inc.

The Commonwealth Plan, Inc.

The Commonwealth Plan of Puerto Rico, Inc.

The Commonwealth System, Inc.

Financial Leasing Corporation

Lease Capital, Inc.

The Midwest Commonwealth Plan, Inc.

The Pacific Plan, Inc.
The Worcester Plan, Inc.
ComPlan, Inc.
BLFC Securities Corporation
Bravo Oil Company
Constellation 130, Inc.
Constellation Reinsurance Company
Constellation Reinsco, Inc.
CRM Associates, Inc.
One Market Street Properties, Inc.
Pacific Petroleum Pipe Lines, Inc.
SoPac Finance N.V.
Southern Pacific Development Company
Canton Street Properties, Inc.
Golden Empire Investment Corporation
Southern Pacific Industrial Development Company
Southern Pacific Land Company
Southern Pacific Pipe Lines, Inc.
Black Mesa Pipeline, Inc.
Mescalero Pipeline, Inc.
Southern Pacific Transportation Company
Dallas Terminal Railway & Union Depot Company
Evergreens Leasing Corporation
Louis Heller, Incorporated
Holton Inter-Urban Railway Company
Los Angeles Union Terminal, Inc.
Northwestern Pacific Railroad Company
Pacific Fruit Express Company
Pacific Motor Transport Company
Pacific Motor Trucking Company
Petaluma & Santa Rosa Railroad Company

St. Louis Southwestern Railway Company

Southern Pacific Air Freight, Inc.

Southern Pacific Equipment Company

Southern Pacific International, Inc.

Southern Pacific Marine Transport, Inc.

Southern Pacific Warehouse Company

Visalia Electric Railroad Company

Sunset Communications Company

Sunset Insurance Company

2. *Jointly Controlled Companies:*

Southern Pacific Company owns, directly or indirectly, a portion of the capital stock of the following jointly controlled companies:

Arkansas & Memphis Railway
Bridge and Terminal Company

The Alton & Southern Railway Company

Central California Traction Company

GeoProducts Corporation

Galaxy Reinsurance Company

Ingeneria y Desarollo del Pacifico, S.A. de C.V.

Glascar, Inc.

Kansas City Terminal Railway Company

Main Street Warehouse Company

The Ogden Union Railway & Depot Company

Portland Terminal Railroad Company

Portland Traction Company

San Diego Pipeline Company

Southern Illinois & Missouri Bridge Company

The Southwestern Town Lot Corporation

SPPLITT, Ltd.

Sunset Railway Company

Terminal Railway Association of St. Louis

TOPS On-Line Services, Inc.

Trailer Train Company

In addition to its former domestic operating companies, American Telephone & Telegraph Company owns, wholly or partially, the following domestic and international subsidiaries:

Eastern Telephone and Telegraph Company

Transoceanic Communications, Incorporated

Transoceanic Cable Ship Company, Inc.

Transpacific Communications, Incorporated

195 Broadway Corporation

The Advanced Mobile Phone Service, Inc.

American Bell Inc.

AT&T International Inc.

American Bell Inc. Services

AT&T International United Kingdom, Limited

AT&T International Japan K.K.

AT&T International (Taiwan), Inc.

AT&T International (Greece) Ltd.

AT&T International East Asia, Inc.

Domestic and International Sales Corporation

Western Electric International, Incorporated

AT&T International Far East, Limited

American Bell International, Inc.

American Telephone and Telegraph
Overseas Finance N.V.

Bell Telephone Laboratories, Incorporated

Western Electric Company, Incorporated

Manufacturers' Junction Railway Company

Nassau Recycle Corporation

Sandia Corporation

Teletype Corporation

Teletype International Sales Corporation

Western Electric Company, Limited (London)

Western Electric Government Service Company

Western Electric International Sales Corporation

None of the foregoing entities was a defendant or appellee below.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Southern Pacific Communications Company ("SPCC"), *et al.*, respectfully pray that a writ of *certiorari* issue to review the judgment of the Court of Appeals for the District of Columbia Circuit entered on June 26, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit appears, along with the order denying rehearing, as Appendices ("App.") A and F, respectively. The opinion is officially reported at 740 F.2d 980. The opinion and judgment of the district court, officially reported at 556 F.Supp. 825, appears as App. B.[1]

[1] SPCC filed a motion to have this opinion and judgment vacated pursuant to Fed.R.Civ.P. 60(b)(6) due to the collateral estoppel effect of the Seventh Circuit's opinion in *MCI Communications Corp. v. AT&T*, 708 F.2d

(Footnote continued on following page)

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The judgment of the Court of Appeals was entered on June 26, 1984 and a timely petition for rehearing was denied on August 6. The Honorable Chief Justice Warren E. Burger entered an order on October 9, 1984 extending the time for filing a petition for *certiorari* to January 3, 1985. App. G.

STATUTORY PROVISIONS INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 4 of the Clayton Act, 15 U.S.C. §15(a), provides, in relevant part:

> "... [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is bound or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning

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(Footnote continued from previous page)

1081 (7th Cir.), *cert. denied*, 104 S.Ct. 234 (1983). That motion was denied in an opinion of the district court officially reported at 567 F.Supp. 326, which was affirmed by the Court of Appeals for the District of Columbia Circuit on July 31, 1984 and officially reported at 740 F.2d 1011. These latter two opinions are not the subject of this petition; they are reprinted at Apps. C and D.

on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances."

The Fifth Amendment to the United States Constitution provides, in relevant part, that "[n]o person shall be . . . deprived of life, liberty, or property without due process of law . . .."

STATEMENT OF THE CASE

I.

PRELIMINARY STATEMENT

This case involves an antitrust suit filed by SPCC against American Telephone & Telegraph Company ("AT&T"), alleging that the latter monopolized the market for private line telecommunications services through its interconnection, pricing and marketing practices. The matter was tried before Judge Charles R. Richey without a jury. In December of 1982, he issued a 602-page typewritten opinion finding against SPCC in all respects.

The content of that opinion, and the manner in which it was authored, are extraordinary. As summarized by the Court of Appeals:

> "[I]n his Memorandum Opinion, the District Judge strongly expressed his personal policy view that an AT&T monopoly, and not competition, is in the public interest in the telecommunications industry. Moreover, in drafting his extremely lengthy Memorandum Opinion, the trial judge simply copied—word-for-word (including even typographical errors)—most of AT&T's proposed findings of fact and conclusions of law. Virtually every assessment of the credibility of witnesses, finding of fact and conclusion of law is in favor of AT&T. Finally, almost as if to ensure a preferred result, the trial court's judgment is supported by

layer upon layer of alternative holdings on the issues of implied antitrust immunity, monopoly power, unlawful maintenance of monopoly power, injury-in-fact and proof of damages." (740 F.2d at 983-84; App. at A-3.)

Because of these factors, SPCC sought to have the appellate court reverse the district court's judgment on the ground of the trial judge's legally disqualifying bias. Alternatively, SPCC asked that, even if no such bias were found to exist, the appellate court scrutinize the evidence solely for the purpose of determining whether the district court's erroneous beliefs substantially influenced its judgment, rather than applying the "clearly erroneous" standard of review set forth in Fed.R.Civ.P. 52. The appellate court rejected both these requests and affirmed the judgment of the district court.

In order to understand the nature of the trial judge's "personal policy views," it is necessary to describe briefly the recent history of the telecommunications industry and the actions of AT&T that led to the present lawsuit.

II.

THE PARTIES AND THE EMERGENCE OF COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY

SPCC was formed in January 1970, as a subsidiary of the Southern Pacific Company, to provide business and governmental private line communications services over its own intercity network.[2] Pursuant to FCC authorization, SPCC commenced commercial operations on December 26, 1973. Plaintiff's Trial Exhibit ("PX") 6-001 at 12-14 (Furth).

AT&T, the defendant in this case and the largest corporation in the world (PX1-0017 at 2005), is the parent company

[2] Private line communications services use circuits dedicated exclusively to the use of the customer, as opposed to the shared-use circuits used for most telecommunications services. PX6-0005 at 8-10 (Owen). SPCC subsequently initiated a service called SPRINT, which competes with AT&T's shared-use switched services. SPRINT, and AT&T's responses thereto, are not in issue in this case.

of numerous subsidiaries, formerly including the 24 Bell Operating Companies ("BOCs").[3] Each of the BOCs, also defendants below, possessed an exclusive franchise or monopoly in the geographic area in which it provided service. Trial Transcript ("Tr.") 646 (Grant). Through its Long Lines Department ("Long Lines"), AT&T provides interstate and intercity private line telecommunications service in direct competition with SPCC. PX6-0005 at 4-5 (Owen); PX4-0004 at 11-12 (Grant); AT&T Trial Exhibit ("S-T-") 131 at 29-30 (deButts).

For most of this century, AT&T and its 24 affiliated BOCs have grown and prospered as monopolists. This situation slowly began to change in the late 1940's, as the FCC began to find that telecommunications competition was necessary, desirable, and technically feasible. The first competitive encroachment upon AT&T's intercity microwave communications monopoly came in *Allocation of Frequencies in the Bands Above 890 Mc,* 27 F.C.C. 359 (1959), *recon. denied,* 29 F.C.C. 825 (1960), when the FCC liberalized the licensing of privately owned microwave systems. AT&T strenuously opposed this decision, which enabled its largest business and government customers to construct and operate communications systems for their own internal use. It immediately responded to the perceived threat of private microwave systems by filing a new rate tariff —Telpak—that was designed to "strike hard at our competition" (PX2-0017 at 1397) by reducing rates by up to 85% for customers with large private line circuit requirements.

Above 890 Mc only permitted entities to build private microwave systems for their own use, and AT&T's tariffs prevented users of AT&T service from reselling that service to others. In 1963, Microwave Communications, Inc. ("MCI") took the next step by filing an application with the FCC to build a private microwave system between Chicago and St. Louis and provide intercity telecommunications services to business customers on a common carrier basis. As in *Above 890 Mc,* AT&T vigorously objected to MCI's competitive application. Nevertheless, the FCC granted MCI's application in 1969, thereby

[3] Pursuant to a modified final judgment entered in settlement of *United States v. AT&T,* No. 82-0192 (D.D.C.), AT&T's wholly owned operating companies were divested as of January 1, 1984, and consolidated into seven independent regional companies.

authorizing MCI to become the first non-AT&T carrier to enter the long distance telephone business since early in the century. *MCI,* 18 F.C.C.2d 953 (1969), *recon. denied,* 21 F.C.C.2d 190 (1970).

III.

THE SPECIALIZED COMMON CARRIER DECISION

The *MCI* decision spawned a host of applications from new carriers, including SPCC, to enter the intercity market. In response, the FCC instituted a rulemaking proceeding to determine "whether as a general policy the public interest would be served by permitting the entry of new carriers in the specialized communications field." *Specialized Common Carrier Services,* 24 F.C.C.2d 318, 327 (1970). AT&T reasserted its opposition to new competition. It argued that the new carriers would engage in "creamskimming"—competition only on selected profitable routes, leaving the less profitable routes to existing carriers and thereby diverting revenues from them. However, the FCC again firmly rejected AT&T's arguments. In *Specialized Common Carrier Services,* 29 F.C.C.2d 870, 920 (1971), *aff'd sub nom. Washington Utils. & Transportation Comm'n v. FCC,* 513 F.2d 1142 (9th Cir.), *cert. denied,* 423 U.S. 836 (1975), the Commission declared that "a general policy in favor of the entry of new carriers in the specialized communications field would serve the public interest, convenience, and necessity."

The *Specialized Common Carrier* decision also dealt with a fundamental problem facing the newly authorized specialized common carriers ("SCCs"). Like AT&T Long Lines, the SCCs proposed to provide intercity services primarily by microwave transmission. However, it was neither technically nor economically practical to carry a signal by microwave directly to a customer's premises. To serve customers located in urban areas, it was necessary for SPCC and the other SCCs to interconnect their intercity microwave systems with a local system of wire transmission facilities called local distribution facilities ("LDFs"). These LDFs were only obtainable from the local

telephone companies which, in nearly all locations served by SPCC, were owned and controlled by AT&T's Bell Operating Companies.

The FCC recognized in its *Specialized Common Carrier* decision that the new entrants would need to interconnect their intercity facilities with existing AT&T-controlled LDFs. Furthermore, although AT&T expressed its willingness to discuss the necessary technical arrangements with the SCCs, the Commission recognized that AT&T had the incentive and the ability to refuse interconnection to these essential facilities and to favor Long Lines over its competitors. Accordingly, pursuant to the provisions of Section 201(a) of the Communications Act (47 U.S.C. §201(a)), the FCC ordered AT&T to provide the SCCs with LDFs for all services on reasonable terms and conditions, and stated that it would "not condone any policy or practice" whereby "a carrier [that] has monopoly control over essential facilities . . . would discriminate in favor of an affiliated carrier or show favoritism among competitors." 29 F.C.C.2d at 940.

IV.

AT&T'S RESPONSE TO THE SPECIALIZED COMMON CARRIER DECISION

A. AT&T's Corporate Policy.

AT&T refused to accept the FCC's mandate permitting competition in the intercity private line business. The notes of a 1972 meeting of the chairman and top officials of AT&T and the presidents of all the BOCs (PX1-003 at 0434-35) illustrate AT&T's unified response to the threat of competition:

> "Large amount of revenues vulnerable which we can preserve if we choke off now. I think you have to hit the nails on the head." (Charles L. Brown, President, Illinois Bell Telephone Company.)
>
> "Shouldn't we act now rather than wait until they have going business which regulators might not permit us to dislodge." (A. W. Van Sinderen, President, Southern New England Telephone Company.)

> "You bastards are not going to take away my business." (Thomas S. Nurnberger, President, Northwestern Bell Telephone Company.)

By 1973, AT&T's position on competition had been made clear throughout the Bell System. An internal AT&T survey of over 60 upper level managers reported:

> "The corporation has a stated objective relating to our competitive posture which indicates that we do not plan to relinquish our existing markets, *and in fact are attempting to reacquire an interexchange* [intercity] *monopoly.*" (PX1-0021 at 0055; emphasis added.)

Not only was AT&T resolute in its opposition to competition, but it was open in its attribution of the source of the "problem"—the Federal Communications Commission. John deButts, Chairman of the Board of AT&T, called the *Specialized Common Carrier* decision an "arbitrary allocation of the market to others in [the] name of competition" (PX1-0001 at 9) and vowed that the "Bell system is not ready to accommodate itself peaceably to that prospect" *(id.)* or to "regulatory trends we are convinced will impair its ability to do its job" (PX1-0099 at 4). He emphasized that resistance to the FCC's policy of competition "is a task to which Bell System management is ready to commit *all* the resources necessary to accomplish it." *Id.* at 19; emphasis in original.

B. The Implementation Of AT&T's Policy.

AT&T committed its substantial resources to accomplish this task. It used its control over LDFs in combination with its dominant position as the market price-setter in a concerted effort to foreclose competition for intercity business and governmental telecommunications.

AT&T already had a predatory price structure in place to block competition for its largest telecommunications users—the Telpak tariff. Although the ostensible original purpose for Telpak—the competitive threat of private microwave systems—had never materialized (PX2-0060 at 0471; PX2-0380 at 0263), AT&T recognized that Telpak's structure and its below-cost prices would serve another purpose—the elimination of

competition by the SCCs for large customers. However, AT&T needed to develop a rate response that would protect the portion of its market not covered by Telpak—its customers with less extensive private line needs. As AT&T's own economic advisor, Professor Otto Eckstein has stated: "Telpak has always had an anticompetitive character in providing a very substantial discount to the largest of our corporations, a discount which no one has ever claimed can be justified by cost." PX2-0300 at 2.

To afford time to devise a single channel tariff which would foreclose this market segment from competition, AT&T employed its control over LDFs to restrict the ability of SCCs to provide even single channel intercity service. AT&T's tactics included purposefully delaying negotiations for the provision of LDFs, denying any LDF interconnections at all for FX and CCSA[4]—two services which comprised a substantial portion of the private line demand not covered by Telpak, and providing interconnections for non-FX or CCSA circuits that were of inferior quality and at higher prices than those provided to its own Long Lines department. Internally, AT&T described its interconnection practices as "obstructionist," "hawkish," and "anti-competitive" (PX1-0147 at 1125), and recognized that these practices, which were admittedly "designed to limit competitive encroachments," were "doomed to ultimate failure" (PX1-0023 at 1007).

> "Most managers interviewed by the team felt that the only strategy in this area now is to delay and minimize the loss of our monopoly position." (*Id.* at 1006.)

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[4] FX (foreign exchange) is a service which gives a telephone user in one locality the equivalent of a local phone in a second, distant city by extending a private line dedicated solely to the user from its premises in City A to the telephone company local office in the distant City B. When the customer picks up his receiver in City A, the dial tone comes from City B. PX6-0004 at 5-6 (Grant). Airlines and large hotels typically use FX service so customers from different parts of the country can call a central reservation office in City A at local rates.

CCSA (common control switching arrangement) is a service which gives a large company such as Ford Motors or General Electric the equivalent of a complete private or dedicated telephone system. In the CCSA configuration, a customer leases several switches or portions of switches throughout the country from AT&T's Long Lines department. These switches are connected by long-haul lines known as intermachine trunks. The customers' offices are connected to the switches by access lines. Both the intermachine trunks and the access lines are dedicated private lines. PX6-0004 at 6-8 (Grant).

The restrictive interconnection practices served their purpose, however. In late 1973, AT&T filed a new single channel tariff, known as Hi/Lo, to operate in conjunction with its bulk Telpak tariff. Like Telpak, Hi/Lo was priced below its costs. Although Hi/Lo ostensibly deaveraged AT&T's rates by offering a two-tiered price structure that varied according to the traffic along a particular route, rates were not determined on any cost basis. Rather, prices were purposefully reduced on the routes where the SCCs provided the most competition.

AT&T went forward with its "Telpak with Hi/Lo" plan, even though it internally conceded the existence of significant antitrust problems (PX2-0052 at 0283), realized that its action would be viewed as "[k]illing off emerging competition and requiring higher rates elsewhere to recover the lost contribution in order to effect the kill" (PX3-0424 at 2335), and "readily acknowledge[d] the virtual certainty of FCC rejection" (PX3-0488 at 0545). The FCC repeatedly repudiated AT&T's many cost justifications for Telpak, Hi/Lo, and Hi/Lo's successor, MPL, in 1975, 1976, 1977, 1979, and 1981. However, AT&T masterfully exploited the regulatory process to perpetuate its tariffs by deliberately refusing to supply the agency with adequate cost information. As a result, the unlawful tariffs remained in effect until 1981.

During this period, many of AT&T's early interconnection restrictions were eliminated by or under threat of FCC order. In April 1974, the Commission ruled that FX and CCSA had been encompassed in the 1971 *Specialized Common Carrier* decision and ordered AT&T to interconnect the SCCs for these services. *Bell System Tariff Offerings,* 46 F.C.C.2d 413 (1974), *aff'd sub nom. Bell Tel. Co. of Pa. v. FCC,* 503 F.2d 1250 (3d Cir. 1974), *cert. denied,* 422 U.S. 1026 (1975). In May 1975, AT&T agreed to eliminate many of its most egregious technical requirements as part of a settlement reached in the course of an FCC-initiated proceeding to consider AT&T's interconnection practices. *AT&T,* 52 F.C.C.2d 727 (1975). However, these restrictions were replaced by a more subtle but no less effective system of performance incentives to AT&T employees designed to insure that SPCC received less efficient order, installation, and repair service for the LDFs it leased from the BOCs than did Long Lines.

V.

THE PROCEEDINGS BELOW

SPCC's complaint, alleging violations by AT&T of the Sherman and Clayton Acts arising from its interconnection practices and from the Telpak, Hi/Lo and MPL tariffs, was filed on March 27, 1978. AT&T's motion to dismiss on the ground of implied immunity from the antitrust laws was denied by the district court on June 30, 1979. App. E.

Before trial, AT&T requested that the district court resolve certain important legal issues *in limine*. However, the district court delegated this responsibility to two Special Masters who previously had been appointed to resolve discovery matters. The Special Masters issued comprehensive opinions largely favorable to SPCC on these issues,[5] which were appealed by AT&T to the district court; SPCC moved to adopt the opinions with minor modifications. The district court never issued any decision on the Special Masters' opinions, and once the trial began, never acknowledged or applied any of their rulings.

Trial to the district court began on May 10, 1982, and lasted for a total of 33 court days. At the request of the district court, most of the parties' direct testimony was submitted in advance in writing; oral testimony generally was limited to brief cross-examination.[6] *See* 556 F. Supp. at 851-52, 1098; App. at B-7, 453. AT&T's motion for involuntary dismissal pursuant to Fed.R.Civ.P. 41(b) was deferred by the district court until the close of evidence.

On December 21, 1982, the district court issued a 602-page Memorandum Opinion, copied almost entirely from AT&T's

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[5] The Special Masters were Professors Geoffrey C. Hazard, Jr. of Yale Law School and Paul R. Rice of the Washington College of Law; both served as Special Masters in *United States v. AT&T*. Their opinions, *inter alia*, recommended legal standards on the significance of regulation; the scope of antitrust immunity provided by the *Noerr-Pennington* doctrine; predatory pricing; the criteria for determining the existence of monopoly power in a regulated industry; the relevant market definition; the elements of illegal tying arrangements; and the interconnection responsibilities created by the essential facilities doctrine.

[6] SPCC presented 24 witnesses on its case-in-chief, nine on rebuttal, and introduced over 1,400 exhibits. AT&T presented 147 witnesses and over 7,900 exhibits. 556 F.Supp. at 851; App. at B-6.

proposed findings of fact, and holding for AT&T on every significant legal and factual issue. The district court so ruled, despite the fact that a jury in a parallel civil antitrust suit involving plaintiff MCI had found AT&T guilty of monopolizing private line telecommunications and the Seventh Circuit subsequently affirmed much of that verdict, and despite the fact that Judge Harold H. Greene, Jr., in the government suit against AT&T ordered it to divest itself of the BOCs, in part because of this same monopolizing conduct. *See MCI Communications Corp. v. AT&T,* 708 F.2d 1081 (7th Cir.), *cert. denied,* 104 S.Ct. 234 (1983); *United States v. AT&T,* 552 F.Supp. 131 (D.D.C. 1982), *aff'd summarily sub nom. Maryland v. United States,* 103 S.Ct. 1240 (1983).

The district court's judgment was appealed to the United States Court of Appeals for the District of Columbia Circuit. That court reversed the district court's holdings that AT&T was immune from the antitrust laws and lacked monopoly power. However, it found no clear error in the district court's alternative holdings that AT&T had not engaged in monopolizing conduct through its interconnection and tariff policies.

REASONS FOR GRANTING THE WRIT

The district court approached the trial of this case with the firm convictions that AT&T's monopoly over private line services was in the public interest, that the FCC's attempt to introduce what the district court called "contrived competition" in the private line sector was utterly reprehensible, and that the SCCs were motivated solely by the desire to make quick profits at the expense of the public. These convictions led it to adopt verbatim virtually all of AT&T's proposed findings of fact in an opinion adverse to SPCC on all legal and factual issues. Under these circumstances, clear judicial disqualifying bias existed; SPCC was denied the fair trial guaranteed to it by the Fifth Amendment. Therefore, this Court is respectfully asked to vacate the opinion below and remand the case for a new trial, without further review of the record. At the very least, these circumstances require a departure from the "clearly erroneous" standard of review, which was applied inappropriately by the

appellate court below. The district court's factfindings should have been reviewed solely to determine whether they were "substantially influenced" by its fixed, legally irrelevant convictions; this is the standard mandated by *Kotteakos v. United States,* 328 U.S. 750 (1946). This Court is therefore respectfully requested in the alternative either to remand this case to the Court of Appeals with instructions to consider the evidence under the *Kotteakos* standard or to apply the *Kotteakos* standard itself.

ARGUMENT

I.

THE DISTRICT COURT'S OPINION AND THE MANNER IN WHICH IT WAS AUTHORED DEMONSTRATE LEGALLY DISQUALIFYING BIAS

This Court has repeatedly held that a fair trial by an impartial judge is a fundamental element of the Fifth Amendment's guarantee of due process of law. As stated in *In the Matter of Murchison,* 349 U.S. 133, 136 (1955):

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.' Tumey v. State of Ohio, 273 U.S. 510, 532 . . .. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 14 . . .."

Accord, e.g., Withrow v. Larkin, 421 U.S. 35, 47 (1975); *Mayberry v. Pennsylvania,* 400 U.S. 455, 465 (1971); *Commonwealth Coatings Corp. v. Continental Cas. Co.,* 393 U.S. 145, 150 (1968).

Here, SPCC was denied such a fair trial. The district court's opinion was the product of its personal beliefs that an AT&T monopoly is in the public interest and "that the antitrust laws were never intended to destroy an essential public utility such as we have here." 556 F.Supp. at 1097; App. at B-449. Moreover, the opinion itself, including findings of credibility of witnesses and weight to be given evidence, was almost entirely authored by AT&T. The district court's decision clearly was "influenced by concerns irrelevant to the issues," and the manner by which that decision was reached indicates that SPCC's case was not "judged impartially and fairly." *Crandell v. United States,* 703 F.2d 74, 78 (4th Cir. 1983). As a result, an automatic reversal and a remand for a new trial are necessary.

A. The Decision Was Based On Judge Richey's Policy Bias Against Competition In Long Distance Service.

Statements made by the district court during the trial, emphasized in its opinion, and reiterated during post-trial proceedings, demonstrate that its decision was influenced by personal convictions which had no proper place in its judicial capacity. Those convictions include the following:

> 1. The national interest is best served by an AT&T monopoly of long distance service. Therefore, the FCC's *Specialized Common Carrier* decision permitting competition in this area was wrong as a matter of national policy.[7] The ill effects of that decision will be compounded

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[7] *E.g.*, tr. 3981 (competition by SCCs "could pose a serious threat not only to the efficiency [of telephone service] but possibly other things that would be deleterious to the welfare of the United States of America"); tr. 864 ("it will penalize the public with higher rates and a lower grade of service"); tr. 3982 (equal access by SCCs to customer premises "does have implications of national policy [and] . . . does cause the Court some concern as a citizen"); tr. 6060 ("there was a need for it [this monopoly], it was in the public interest"); transcript of Rule 60(b) hearing ("60(b) tr.") 33 ("if [the] regulators keep fooling around with this ['contrived competition'] too long it will probably be too late to put Humpty Dumpty back together again"); 556 F.Supp. at 1096, App. at B-449 ("the bottom line of 'public interest' has actually been construed as what some powerful interests in this country want

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by AT&T's divestiture of the BOCs.[8]

2. AT&T, "a company that has rendered over the years a very great public service" (tr. 3514), and is "vital to the national defense" (tr. 3513), has properly fought to preserve its monopoly and the status quo. *E.g.*, 556 F.Supp. at 903-06; App. at B-96 to 104. By contrast, new entrants such as SPCC have been motivated purely by greed and the chance for quick profits.[9]

3. The FCC and other regulators "miserably mishandled or failed to handle" their responsibilities. *Id.* at 1096; App. at B-448. The FCC staff was "totally unprofessional and inadequate" *(id.)*, and included people

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as distinguished from what the public can afford"); *id.* at 1097, App. at B-450 (the FCC "put the Specialized Common Carriers into business for the benefit of a few without taking into account the myriad of problems to our people and to our national security"); *id.* at 1066, App. at B-393 (" 'competition' which is contrived or subsidized is not in the public interest. Hopefully, it is not too late to get responsible regulators to bring our country back to sanity in this emerging and advancing field of telecommunications"); *id.* at 1096, App. at B-448 ("what the FCC did over the years was talk about competition (in reality contrived) in order to achieve deregulation which has been and will be shown to be contrary to the best interests of millions of Americans throughout the country and by those outside the profitable big city areas with a resultant loss of service, quality, and higher costs to those least able to afford this now essential service"); *id.* at 903, App. at B-98 ("what is certain is that the average consumer's bill will go up, while the intercity, interstate services will remain lower due to the effects of competition").

[8] *E.g.*, tr. 1415 (as a result of divestiture, "the price will go sky high, for the consumer"); tr. 3136 (divestiture "is going to ruin the telecommunications industry in this country. I think it was a bad, bad thing to have done"); tr. 3137 ("you are going to be paying through the nose"); tr. 4146 ("Consumers will have to bear the brunt of it"); 60(b) tr. 69 ("it isn't right that everybody isn't going to have equal access to the telephone at the same price, or the price based on their ability to pay .... It just isn't right to abandon that basic principle").

[9] *E.g.*, 556 F.Supp. at 1097, App. at B-449 (the FCC acceded "to the greed of a few"); *id.* at 1096, App. at B-449 ("creamskimming the big city areas where profits are maximized"); 60(b) tr. 33 (the SCCs operate in "the profit maximizing areas of the United States of America to the exclusion of the poor, to the exclusion of those least able to pay"); tr. 5227 (characterizes the SCCs as wanting AT&T to "turn over all their plant and equipment for you to use any way you want, hell with the stockholders of this country, let's nationalize it"); 60(b) tr. 33-34 ("in the less populated areas of the United States, which your client has never even dreamed of serving, no matter what

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who, for their own ends, had evil designs on AT&T.[10] Since several SPCC witnesses were formerly employed by or associated with the FCC, none of their testimony was believable.[11]

4. Faced with the intolerable situation of "contrived competition" as a result of the *Specialized Common Carrier* decision, AT&T could fully satisfy all of its responsibilities under federal law simply by obeying the regulations of the FCC *as AT&T interpreted them.* Any "FCC findings of 'unjustified' or 'unlawful' [conduct by AT&T] are, at most, proof that AT&T has been unable to predict successfully what standards the FCC will utilize." 556 F.Supp. at 1055 n.278; App. at B-373 n.278.

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they say, and didn't and haven't and won't, and neither will MCI"); 60(b) tr. 33-34 ("if your interpretation and the Commission's interpretation . . . mean what you say they do, I guess I better resign from the bench, and become a multi-millionaire overnight and go into the Specialized Common Carrier business, because all I will have to serve are the rich, who can really afford to pay through the nose").

[10] *E.g.*, 556 F.Supp. at 913, App. at B-115 ("Drs. Owen and Melody and Messrs. Hinchman and Cox . . . trying to wreck [*sic*] havoc on *the* largest corporation in the world"); *id.* at 1056-57, App. at B-376 ("under the direction of Mr. Hinchman . . . the staff launched into a program to protect the specialized carriers from competition from AT&T and to create FCC findings that could be utilized as predicates in antitrust actions against the Bell System"); *id.* at 1057, App. at B-378 ("the Common Carrier Bureau's objectivity was flawed because of blatant conflicts of interest"); *id.* at 925, App. at B-138 (the FCC "may have been primarily motivated by a desire to protect inefficient new carriers such as SPCC").

[11] *E.g.*, 556 F.Supp. at 932 n.125, App. at B-150 n.125 ("It must be pointed out that the plaintiffs' experts are generally former FCC employees and therefore their independence is suspect"); tr. 6143-44 ("I just cannot place any credence in what any of the three of them said, and I think their conduct was absolutely reprehensible"). The district court's FCC phobia was carried to the extreme in its excoriation of Mr. Hinchman, an SPCC witness and former Chief of the FCC's Common Carrier Bureau, for taking with him when he left the agency copies of documents contained in his personal files. Despite no showing that any regulation was violated, no showing that Mr. Hinchman intended anything improper, and statements from the FCC that his actions were an accepted practice of the agency and perfectly appropriate (tr. 556), the district court concluded:

> "I am going to have a hard time, you are entitled to know, putting any credence in Walter Hinchman and Associates. A man that worked for the FCC, carries off bushels and bushels and bushels of documents that belong to the public and the Government of the United States. . . . The fact that the Commission comes in here and tries to tell us that it was all right to do that doesn't make it so." (Tr. 6143-44.)

That the district court held these policy views is undisputed; indeed, the Court of Appeals itself stated:

> "It is clear that the District Judge did hold the view that AT&T's former monopoly in private line telecommunications was in the public interest and that competitive entry into this market was contrary to the public interest. This view is inconsistent with the determination that the FCC made in *Specialized Common Carriers* . . . that competitive entry into this market *is* in the public interest. The FCC's determination was upheld by the Ninth Circuit and was given broad effect by this Court in *AT&T v. FCC*, 539 F.2d 767, 773-74 (D.C. Cir. 1976). The District Judge's proper role in deciding this case was to apply the antitrust laws to the facts *given* this policy of allowing competition. It was not part of his official role in deciding this case to pass judgment on, or even to express his personal views concerning, the FCC's policy decision to allow competition." (740 F.2d at 993, App. at A-23; emphases in original.)

But the district court's convictions were not just legally irrelevant; they were incompatible with the antitrust laws it was being asked to apply. The district court's convictions proved to be an insurmountable barrier to SPCC's attempt to show that AT&T abused its monopoly position, and virtually compelled a decision in favor of AT&T.[12]

B. The District Court's Opinion Was Largely Authored by AT&T.

The district court's conclusion that AT&T was immune from the antitrust laws made it unnecessary to rule on any other legal or factual issue in the case. Nevertheless, obviously

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[12] Judge Richey's convictions may stem from his prior service (1967-71) as General Counsel of the Maryland Public Service Commission. State commissioners generally have opposed increased competition in the telecommunications industry. *See* 556 F.Supp. at 905, App. at B-101-02. In stark contrast to his opinion of the FCC, Judge Richey believed that "[t]he states have done a particularly good job in regulating [the Bell system] in order to insure the highest quality of service at the lowest possible cost for all of their citizens." *Id.* at 1096; App. at B-449. Judge Richey addressed the following comment to AT&T's former Chairman, Mr. deButts, during his examination: "What about that $30 million that I helped to get for you in the State of Maryland in 1968 or 1969? . . . the biggest rate increase you had ever gotten up to that point in the history of the state." Tr. 4067.

determined to fashion an "appeal proof" opinion (the phrase it used at a post-trial Rule 60(b) hearing),[13] the district court adopted almost completely the one prepared for it by AT&T. That opinion decides every issue in favor of AT&T. As the Court of Appeals noted, in an attempt to assure the legal sufficiency of its ruling, and to "layer" its findings to avoid appellate scrutiny,

> "... the District Court adopted 730 of the 746 paragraphs of AT&T's proposed findings and conclusions; on a line-by-line basis (excluding quotations), 80.5% of the opinion is copied from AT&T's proposed findings and conclusions, 4.4% is copied from SPCC's proposed findings and conclusions (on all nonsubstantive matters), and 15.1% is original material.... The District Court even copied dozens of typographical errors from AT&T's submission; these were corrected before publication by an order filed January 10, 1983." (740 F.2d at 988; App. at A-13.)

As a result, most of Judge Richey's findings are not " 'worth the paper they are written on as far as assisting the [appellate] court ... in determining why the judge decided the case.' " *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656 n.4 (1964). The completely uncritical manner in which the district court adopted these findings is brought home by the fact that it even adopted descriptions in AT&T's proposed findings of its work process and reactions to witnesses and to arguments.[14] In view of its wholesale abandonment of its factfinding role to AT&T, it should come as no surprise that none of

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[13] 60(b) tr. 112 ("[O]f course, the decision is appeal proof and I hope you know that by now"); 60(b) tr. 116 ("I don't care whether you go to that court [one created by the European Common Market] or the Hague or wherever you go, I am ... confident ... that my opinion will stand, will be affirmed").

[14] For example, AT&T proposed, and the district court accepted, the following language: 556 F.Supp. at 911, App. at B-113 ("Moreover, the Court has read every single document to which plaintiffs have directed its attention"); 990, App. at B-256 ("the Court is particularly struck by"); 991, App. at B-259 ("From the Court's perspective, perhaps the most significant evidence"); 994, App. at B-264 ("of particular significance to the Court is"); 995 n.207, App. at B-265 n.207 ("In the Court's view, the language used in the April 1974 decision is intellectually dishonest"); 997 n.209, App. at B-268 n.209 ("The Court has examined carefully a number of AT&T documents"); *id.* ("no reason occurs to the Court"); 1001, App. at B-276 ("The Court has examined in detail the evidence on all of plaintiffs' charges relating to LDF

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SPCC's 27 witnesses was believable,[15] that AT&T's 147 witnesses (the majority of whom never appeared in open court) "were credible in all respects" (556 F.Supp. at 1027; App. at B-332), that none of SPCC's arguments was supportable, and that every proposition advanced by AT&T was correct.

C. The District Court's Bias And Abdication Of Its Judicial Function To AT&T Require Reversal And A New Trial.

The combination of all the foregoing factors compels the conclusion that SPCC did not receive the "fair trial" mandated by this Court in *Murchison* and other cases. In approaching this case with irrelevant personal convictions that tainted his view of the evidence, in making credibility determinations based merely upon a witness' association with a particular group (*e.g.*, former

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terms and conditions"); 1010, App. at B-291 ("Of perhaps the greatest significance, in the Court's view"); 1013, App. at B-298 ("The Court found Ms. Cashman's testimony especially credible and persuasive"); 1015, App. at B-300 ("The Court is deeply troubled by"); 1021, App. at B-311 ("The Court found the . . . testimony of Mr. Kelley . . . and Mr. Weinstein . . . particularly persuasive on this point"); 1026, App. at B-321 ("This charge by plaintiff . . . has been of consistent concern to the Court throughout the trial"); 888 n.69, App. at B-70 n.69 ("As the Court reads the relevant decisions"); 890 n.72, App. at B-73 n.72 ("Based upon the Court's experience"); 907 n.81, App. at B-104 n.81 ("plaintiffs engaged in what this Court views as an ill-conceived effort"); 1029, App. at B-326 ("The Court is particularly impressed with the nature and function of AT&T's Business Relations organization"); 1030, App. at B-328 ("Indeed, the Court finds the Operational Review process . . . a laudatory undertaking"); 1031, App. at B-329 ("The Court has examined all of the Operational Reviews with great care"); 1031 n.253, App. at B-330 n.253 ("It is entirely understandable to the Court"); 1032, App. at B-331 ("The Court finds particularly pertinent"); 1034, App. at B-336 ("the Court is struck by the . . . testimony of defendants' employees").

[15] *See, e.g.*, 556 F.Supp. at 943, App. at B-171 ("The Court is not according any weight to Dr. Melody's testimony"); *id.*, App. at B-171 ("The Court does not find the testimony of Mr. Scott or Mr. Tucker, both employees of Walter Hinchman Associates, to be any more persuasive than that of Dr. Melody"); 997, App. at B-269 ("Mr. Vasilakos' testimony lacked credibility"); 1010, App. at B-293 ("the Court rejects as not credible the testimony of Mr. Kopf"); 1045, App. at B-356 ("Mr. Gundy simply did not understand forecasting procedures"); 1046, App. at B-357 ("Mr. Bastic's charges are frivolous"); 1086, App. at B-430 (". . . Mr. Vasilakos, whom the Court found exceptionally evasive").

FCC employees) in uncritically rubber-stamping the findings of AT&T, and in frankly seeking to create an "appeal-proof" decision, Judge Richey did not give SPCC a fair hearing. This combination of factors requires reversal and a new trial.

Findings of fact and credibility determinations cannot stand "when predicated upon a material error of law." *Faulkner Radio, Inc. v. FCC*, 557 F.2d 866, 870 (D.C.Cir. 1977). In *Faulkner Radio*, reversal was required because the trier of fact irrationally favored the testimony of certain witnesses merely because they were lawyers. Similarly, in *Nicodemus v. Chrysler Corp.*, 596 F.2d 152, 155-56 (6th Cir. 1979), reversal was required where the district court expressed an unfounded animosity against Chrysler witnesses, calling them "a bunch of villains . . . interested only in feathering their own nests . . .." *Cf. Reserve Min. Co. v. Lord*, 529 F.2d 181, 185 (8th Cir. 1976) (reversal ordered where judge announced on record that none of defendants' witnesses were believable and he had no faith in them). Judge Richey's credibility determinations here are closely analogous. He rejected the testimony of SPCC's witnesses because, as former FCC employees, "therefore their independence is suspect" (556 F.Supp. at 932 n.125; App. at B-150 n. 125), while according special deference to the testimony of an AT&T witness simply because he was a partner of a well-known accounting firm.[16] Like the Chrysler executives who were only interested in "feathering their own nests," SPCC and other SCCs were, according to Judge Richey, "creamskimmers" who were motivated by "greed." *See* note 9, *supra.*

Reversal for bias has been ordered for other types of conduct and beliefs analogous to those of Judge Richey. For example, in *Knapp v. Kinsey*, 232 F.2d 458, 461 (6th Cir.), *cert. denied*, 352 U.S. 892 (1956), the district judge, *inter alia*, had improperly "conduct[ed] a searching inquisition into what he considered to be neglectful inaction [by] the Securities and Exchange Commission." Here, Judge Richey excoriated the FCC for its "ineptitude" and ill-founded creation of "contrived competition," and accused SPCC witnesses of stealing docu-

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[16] *See* 556 F.Supp. at 932 nn. 124, 125, App. at B-150 nn.124, 125: "with the Peat name behind this study, the Court is satisfied that there was complete independence in performing this study . . .. Moreover, [SPCC's witnesses] are not subject to the same stringent code of ethics that Mr. Morrison is, as a partner in Peat, Marwick."

ments from the agency despite the FCC's approval of the practice. *See* notes 10-11, *supra.* In *Crandell v. United States*, *supra*, 703 F.2d at 75-76, the district judge, *inter alia*, had expressed concern that a victory for the plaintiffs would cause medical malpractice insurance rates to rise, and had commented that taxpayers would have to pay any damages. Similarly, Judge Richey was convinced that competition from SPCC and the other SCCs is only "for the benefit of a few," is contrary to the public interest, and would lead to a dramatic increase in telephone rates. *See* notes 7-9, *supra.*

To the above factors, which have established reversible bias in other cases, here must be added Judge Richey's rubberstamping of AT&T's findings. "Finding facts requires the exercise by an impartial tribunal of its function of weighing and appraising evidence offered, not by one party to the controversy alone, but by both." *Sims v. Greene*, 161 F.2d 87, 89 (3d Cir. 1947). Judge Richey's procedure in this regard is additional proof that SPCC's case was not judged impartially and fairly.

It is therefore clear that Judge Richey displayed "a personal bias and prejudice which renders invalid [the] resulting judgment in favor of the party so favored." *Knapp v. Kinsey*, 232 F.2d at 466. "[A]t the very least there is more than enough doubt" (*Faulkner Radio, supra*, 557 F.2d at 870) to require complete reversal by this Court.

When confronted with this argument below, the Court of Appeals conceded that it found the trial judge's conduct very "dismay[ing]" and "troubling." 740 F.2d at 984, 997; App. at A-3, A-31. It even admitted that this conduct created a potential appearance of unfairness:

> "A District Judge, particularly one adjudicating a case of considerable public moment, must scrupulously avoid giving the parties or the public any basis for perceiving that he is deciding the case otherwise than pursuant to an application of controlling law to the facts and in the exercise of his impartial, independent, considered judgment. In our view, the trial judge has raised a serious concern that he failed to heed this precept in the present case.

> "Judges certainly may hold personal views on law and policy and may express those views under appropriate circumstances. But the Memorandum Opinion in this case, in which the District Judge held that the antitrust laws do not apply to the defendants' conduct and alternatively that the defendants' conduct did not violate those laws, was an inappropriate place for the Judge to advocate a personal policy view contrary to the policy underlying the antitrust laws. Moreover, it is never justifiable for a judge to abdicate to a party his duty to provide a reasoned explanation for his decision. The misplaced advocacy and extensive copying of findings and conclusions that occurred in this case at least created a danger that the parties and the public would perceive that the Judge impermissibly decided the case on the basis of his personal views rather than on the basis set forth in the Memorandum Opinion." (740 F.2d at 984, App. at A-3 to A-4.)

As a consequence, said the Court of Appeals, "the public and the reviewing court can never be certain that the judge actually decided the case on the grounds given in the Memorandum Opinion." *Id.* at 995; App. at A-28.

Under recognized legal principles, the inquiry of the Court of Appeals should have ended there; the "canon of judical ethics rest[s] on the premise that any tribunal permitted by law to try cases and controversies must not only be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Continental Cas. Co., supra*, 393 U.S. at 150. It should have been enough if SPCC could show that Judge Richey "might reasonably be thought biased against one litigant and favorable to another." *Id.*

The Court of Appeals, however, adopted a far more restrictive approach. It said it was unable to find that Judge Richey had an "irrevocably closed mind" because: he refused to preclude SPCC from introducing evidence in support of its case, he denied AT&T's Rule 41(b) motion during trial, and he denied AT&T's dismissal motion based on immunity at the outset of the case. 740 F.2d at 991-92; App. at A-20 to 22. The Court of Appeals distinguished cases such as *Crandell*, *Reserve Mining*, and *Knapp* on the ground that in those instances, the judge's bias prevented the aggrieved party from being allowed

to put on its case and cast the judge clearly in the role of an advocate. *Id.* at 996-97; App. at A-27 to 28, A-30 to 31. The Court of Appeals therefore entertained a "presumption of regularity" and assumed that Judge Richey adopted AT&T's proposed findings after "full consideration." *Id.* at 994-95; App. at A-26. While acknowledging that this presumption virtually precluded an aggrieved party from ever showing that a decisionmaker harbors an "irrevocably closed mind," the Court of Appeals refused to depart from that presumption here.

We submit that this cannot be the law. It does not matter that Judge Richey's bias did not deprive SPCC of an opportunity to present its case, because it was deprived of a *fair decision, i.e.*, a decision in conformity with the governing law, not the trial court's irrelevant policy views. This right to a fair decision is also a basic guarantee safeguarded by the Fifth Amendment.[17] We further submit that no "presumption of regularity" should have been accepted here, given the cumulative effect of Judge Richey's actions and the consequent harm to "[c]onfidence in the integrity of the judicial process." 740 F.2d at 995; App. at A-28.

II.

THE COURT OF APPEALS ERRED IN APPLYING THE "CLEARLY ERRONEOUS" STANDARD OF REVIEW

A. The "Clearly Erroneous" Standard Of Review Was Inapplicable.

Even if the unique confluence of the trial court's irrelevant policy views, its copying of AT&T's proposed findings, and the one-sided nature of its opinion do not establish legally disqualifying bias, they do compel the abandonment of the clearly erroneous standard of review. The Court of Appeals never addressed this argument, but upheld the district court's findings

[17] Because the trial court's judgment reflected an improper bias, it makes no difference whether an impartial decisionmaker might arguably have reached the same result. "There should be no room in this context for the concept of harmless error to apply, nor for arguments to be made that in fact the judge acted in an impartial manner." 13 C. Wright & A. Miller, *Federal Practice And Procedure*, §3553 at 385 (1975).

that AT&T engaged in no monopolizing conduct on the ground that those findings were not in clear error. 740 F.2d at 998, 999, 1002 n.24, 1007, 1011; App. at A-34, 35, 43 n.24, 53, 60, 61.

This was improper. The Court of Appeals should have reviewed the evidence solely for the purpose of determining whether the district court's erroneous beliefs substantially influenced its judgment. This standard of review is appropriate, both to insure that the district court's legally irrelevant convictions were not the basis for its conclusions and to counterbalance its abdication of its factfinding responsibility to AT&T. Applying such a standard,

> "[I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. *The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the* [decision below] *cannot stand." (Kotteakos v. United States,* 328 U.S. 750, 765-66 (1946); emphasis added.)[18]

If this Court agrees, then the appropriate procedure is for it to either remand the case to the Court of Appeals for application of the *Kotteakos* standard or itself review the trial court's opinion under that standard.

Should the Court elect to take the latter approach, we are confident that it will find that Judge Richey's policy views substantially influenced his judgment. This can be demonstrated by considering the original portions of the trial court's opinion on issues such as antitrust immunity, witness credibility, and other topics.

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[18] Although *Kotteakos* was a criminal case, its reasoning is equally applicable to civil appeals. 11 C. Wright & A. Miller, *Federal Practice And Procedure,* 2883, p. 276 (1973). Former Chief Justice Traynor of the California Supreme Court stated, with regard to substantial errors by trial courts, that "[u]nless the appellate court believes it highly probable that the error did not affect the judgment, it should reverse." R. Traynor, *The Riddle Of Harmless Error* 35 (1970). *See United States v. Nyman,* 649 F.2d 208, 211-12 (4th Cir. 1980).

B. The Original Portions Of The District Court's Opinion Demonstrate The Substantial Influence Of Its Policy Views.

1. The District Court's Ruling On Antitrust Immunity.

The district court made no attempt to examine the Communications Act and determine whether that statutory scheme was repugnant to the antitrust laws, or whether AT&T's pricing and interconnection practices were "pervasively regulated" by the FCC within the meaning of applicable Supreme Court precedent. Indeed, Judge Richey's discussion of immunity (in a rare original portion of his opinion) did not focus on any *pervasive* regulation by the agency, but rather on what he believed to be the FCC's *misguided* regulation:

> "[E]very action complained of in this case could have or should have been handled by the appropriate regulatory bodies, which responsibility the regulators miserably mishandled or failed to handle. What the FCC actually did over the years was talk about competition (in reality contrived) in order to achieve deregulation which has and will be shown to be contrary to the best interests of millions of Americans throughout the country and by those outside the profitable big city areas with a resultant loss of service, quality, and higher costs to those least able to afford this now essential service.
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> * * * * *
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> "The bottom line of 'public interest' has actually been construed as what some powerful interests in this country want as distinguished from what the public can afford, namely, safe, reliable service to everyone (instead of creamskimming the big city areas where profits are maximized) at the lowest possible cost to all and particularly those least able to afford telecommunications service, which should be our continued standard. This Court believes that the antitrust laws were never intended to destroy an essential public utility such as we have here." (556 F.Supp. at 1096; App. at B-448-49; footnotes omitted.)

The judge then went on to castigate the FCC and its staff for "put[ting] the Specialized Common Carriers into business for

the benefit of a few without taking into account the myriad problems to our people and our national security." *Id.* at 1097; App. at B-450.

The district court's ruling on immunity (which the Court of Appeals understandably reversed) was thus truly anomalous. Had it ruled that regulation by the FCC mandated or at least encouraged AT&T's actions (which would otherwise have been repugnant to the antitrust laws), the district court's holding might at least have been logically related to a recognizable legal standard, albeit factually unsupported. However, the district court illogically ruled that AT&T was immune from the antitrust laws because the FCC "miserably mishandled" its attempt to achieve "deregulation," and introduce competition into the telecommunications industry. Thus, according to Judge Richey, the FCC's efforts to *foster* competition (which were inappropriate in the first place) served to *shield* AT&T from the competitive requirements of the Sherman Act. This remarkable decision can only be explained as a product of the district court's irrelevant policy views.

2. The District Court Rulings On Witness Credibility.

Those same policy views also unmistakably tainted Judge Richey's findings that SPCC's witnesses lacked credibility. These determinations cut across all aspects of SPCC's case, but perhaps the most egregious example is the district court's treatment of Walter Hinchman, the former chief of the FCC's Common Carrier Bureau, and those other witnesses whom the judge identified with Mr. Hinchman.

Following its discussion of immunity quoted above, the district court (again, in original words) strongly condemned those in the FCC who it thought had advocated competition for AT&T, including Mr. Hinchman and two of SPCC's expert witnesses on predatory pricing, Messrs. Scott and Tucker:

> "It was primarily the FCC staff during this entire period, after permitting the Specialized Common Carriers entry into the market in the name of competition (really contrived), whose performance was, to say the least, totally unprofessional and inadequate by virtue of the likes of Messrs. Cox, Hinchman, Tucker, and Scott. It was a result

> of their actions (or inaction) as well as a thin majority of the Commissioners in the 60's and 70's that has subjected AT&T to many lawsuits in the antitrust field now pending today. Had the FCC not engaged in its usual regulatory lag and dealt forthrightly and properly with the problems as they arose, then few, if any, of the cases would now be before the antitrust Courts, such as this one." (556 F.Supp. at 1097; App. at B-450.)

The district court reiterated these views from the bench during the Rule 60(b) hearing, where it called for a return to AT&T's monopoly, "not the kind of competition that the likes of Walter Hinchman, Scott and Tucker were talking about, which I called 'contrived' competition, in quotation marks. That is my word, 'contrived.' " 60(b) tr. 32.

Thus, a key villain in Judge Richey's estimation was Walter Hinchman, whom he deemed to be the nefarious architect of the FCC's procompetitive policies and the original cause of the many antitrust suits now pending against AT&T. In extensive findings ghostwritten by AT&T, the district court attacked Mr. Hinchman as "lacking in candor and trustworthiness," and accused the staff of the Common Carrier Bureau of "abandon[ing] all objectivity" and "launch[ing] into a program to protect the specialized carriers from competition from AT&T and to create FCC findings that could be utilized as predicates in antitrust actions against the Bell System." *Id.* at 1056-57; App. at B-376. *See id.* at 1054-57, App. at B-372-76. Similarly, in original findings, it personally condemned Mr. Hinchman for trying to "wreck [*sic*] havoc on *the* largest corporation in the world," and concluded that "Mr. Hinchman in particular lacks any credibility," and is a "biased, interested person." *Id.* at 913 & n.88, 914, 962 n.164; App. at B-115 & n.88, 116, 206 n.164 (emphasis in original).

This animus against the procompetitive policies of the FCC and all those in the Common Carrier Bureau who advocated them poisoned the district court's attitude toward all of SPCC's expert witnesses; as the judge stated, because "plaintiff's experts are generally former FCC employees . . . their independence is suspect." *Id.* at 932 n.125; App. at B-150 n.125. Thus, as seen in the foregoing quotations, Messrs. Scott and Tucker, employ-

ees of Walter Hinchman Associates, were excoriated because of their prior positions with the FCC. *See also* 60(b) tr. 15-16. Similarly, Dr. Bruce Owen, who was not even an employee of the FCC, was attacked because he supposedly wanted to break up AT&T and enlisted the assistance of a Commissioner whose chief aide was Walter Hinchman. 556 F.Supp. at 913 & nn.91, 92; App. at B-116 & nn.91,92. And Dr. William Melody, who was also condemned because of his procompetitive views while on the staff of the FCC, was categorized with Mr. Hinchman as a person to whom "the Court will accord no credibility." *Id.* at 914; App. B-117; *see* 60(b) tr. 63. These credibility determinations—which are based on grounds divorced from the accepted standards for judging the credibility of expert witnesses—clearly reveal the true reasons underlying the district court's later findings that "no weight" whatsoever would be given to the testimony of Dr. Melody and Messrs. Scott and Tucker. 556 F.Supp. at 927-28 n.116; *id.* at 943, App. at B-143 n. 116, 171-72.

Thus, the district court primarily repudiated the credibility of those witnesses, not on the merits of their testimony, but rather because their policy views were the antitheses of its own. It is true that not all the testimony of former FCC staffers was rejected; that of Messrs. Pettit and Darling (who testified for AT&T), for example, was relied upon by the district court. However, those men were among the minority who continually advocated resistance to competition in the telecommunications industry *and who continually lost that argument before the Commissioners of the FCC.* Thus, this case presents a unique situation: the credibility of former agency personnel who were part of an unsuccessful minority within their own agency was uniformly extolled by the judge, while that of former personnel who were part of the prevailing majority, which included the very Commissioners of that agency, was uniformly attacked *because they prevailed.* Indeed, the act of recommending that the FCC adopt certain policies—one of the very reasons for which staff members presumably were appointed—was condemned as wrongful, solely because the policy which those staffers advocated proved to be diametrically opposed to the views held by the district court. *Id.* at 913-14; App. at B-115-

17. Judge Richey thus allowed AT&T to use his courtroom to relitigate—and win—the *very same policy debate* on competition that it had previously litigated—and lost—before the FCC and the courts.

3. Other Portions Of The District Court's Opinion.

The district court's treatment of implied immunity and witness credibility most graphically illustrates how its policy views substantially influenced its judgment. However, those views repeatedly manifest themselves in original findings scattered throughout its opinion. Thus, for example, in the midst of its otherwise AT&T-authored discussion of fact of injury, the district court inserted these original comments:

> "It will be interesting to see what the parties or the FCC does [*sic*] about this [the benefit SPCC supposedly received from AT&T's LDF charges] on behalf of the public! As the Court notes in its conclusion, 'competition' which is contrived or subsidized is not in the public interest. Hopefully, it is not too late to get responsible regulators to bring our country back to sanity in this emerging and advancing field of telecommunications." (556 F.Supp. at 1066; App. at B-393.)

This passage is noteworthy for several reasons. First, it is yet another indication of the district court's fixation on the FCC's supposed mishandling of its regulatory duties and the impropriety of divestiture. Secondly, it has little, if anything, to do with the issue at hand—whether AT&T's alleged overcharges to SPCC for access to LDFs caused SPCC injury. And thirdly, it provides a clear indication of how directly the district court's factfinding was influenced by its strongly held, irrelevant views on matters of telecommunications policy.

These diatribes against the agency's procompetitive policies appear everywhere. Were there barriers to entry in the telecommunications industry? According to the district court, they were due primarily to the "FCC's inaction and/or ineptness as well as known regulatory lag," a view it supported with a citation to the opinion of the *dissenting* Commissioners in *MCI*, 18 F.C.C.2d 953 (1969). 556 F.Supp. at 881-82 & n.53; App. at B-56 n.53. Did competition in the industry become the national policy during the decade of the 1970s? If so, said the

district court, it was because the FCC created an environment of "contrived competition," "within which inefficient firms can enter and survive . . . at the expense of the public. . . ." *Id.* at 885 n.63, 1097; App. at B-63 n.63, 448. Was AT&T using its high prices for switched services, where it faced no competition, to subsidize lower prices for private line services, where it did? If so, said Judge Richey, "[i]t is clear to the Court, that it was not Bell that was the problem, but rather the FCC's own ineptitude." *Id.* at 926; App. at B-140. Did the statements of AT&T's executives in the early 1970s, such as Mr. deButts' 1973 speech to NARUC promising resistance to the FCC's mandate of competition, indicate anticompetitive intent? Hardly, said Judge Richey, who characterized those executives as "businessmen who were straddled [*sic*] with nationwide average prices and saw new entrants unburdened with common carrier responsibility undercut their prices" (*id.* at 891; App. at B-76), and who said that "[i]t is clear to the Court, that more than any other man, Mr. deButts firmly spoke up for the average consumer" (*id.* at 909; App. at B-108).

The foregoing indicates strongly that the district court's policy views infected its entire judgment. Its belief that AT&T's monopoly served the public interest, while the FCC's "contrived competition" did not, colors its rulings on AT&T's anticompetitive intent, and on pricing, interconnection, and the fact and amount of injury. Since this Court cannot determine with certainty the extent to which these views influenced the entire opinion below, the proper recourse is to reverse that opinion *in toto*.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that this Court issue a writ of *certiorari* to review the judgment of the Court of Appeals for the District of Columbia Circuit.

DATED: January 3, 1985